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ADMINISTRATIVE DETERMINATION OF PRIVATE RIGHTS. — Administrative bodies may, in the course of performing their ultimate administrative duties, be called upon to entertain proceedings which will in some manner determine private rights. There are at least three types of statute under which this situation may arise. Under the first,[1] the board makes only preliminary findings, which it certifies to a court, and which the court enters as a judgment, unless exceptions are taken, in which case it may, after a further hearing, either approve or modify the findings. Thus, they become effective, if at all, as in form the decision of a regular judicial tribunal. The second type of statute[2] makes the board's findings themselves final, unless, within a specified time, an appeal is taken to the courts, but if such an appeal is taken, the courts have full power to review. Under the third type,[3] the administrative findings are final. If, in any case, the ultimate purpose for which the findings are made is not truly governmental,[4] they are, of course, wholly

[1] See 3 LORD'S OREGON LAWS, title XLIII, c. 6; 1913 OREGON LAWS, c. 82, 86, 97.
[2] See TEXAS REV. CIV. STAT. (1920), title 73, c. 1, arts. 5011½ f *et seq.*
[3] See 28 STAT. AT L. 372, 390.
[4] For what may be, see Wambaugh, "The Present Scope of Government," 20 REP. AMER. BAR ASSN. (1897), 307. Compare the two opinions in South Carolina *v.* United States, 199 U. S. 437 (1905). *Cf.* The Amalgamated Society of Engineers *v.* The Adelaide Steamship Co., Ltd., 28 Com. L. R. 129 (1920), criticizing the majority opinion in the former case.

ineffective.[5] But assuming that it is governmental, may an administrative body, incidentally to reaching its end, determine private rights without being chargeable with an improper exercise of powers constitutionally conferred upon the judiciary? [6]

Proceedings of the first type have been almost uniformly upheld. Courts have found them to be "preliminary and administrative, not judicial," [7] and have likened them to proceedings before a referee.[8] In doing so, however, they have disregarded the fact that the courts to which the findings are certified must approve them unless exceptions are taken. Such a judgment, though it may indeed constitute the efficient medium of finality, is no more than an unsubstantial appearance of a real judicial pronouncement.[9] So far as the exercise of power by the administrative body is concerned, therefore, this type differs only in form from the second, where the findings themselves become final unless there is an appeal. The constitutionality of this latter type has recently been denied,[10] on the ground that the finality of the findings, unless appealed from, made them judicial.[11] But this seems to involve a misapprehension of the true nature of the board's action. It is true

[5] Kilbourn *v.* Thompson, 103 U. S. 168 (1880). *Cf.* Colonial Sugar Refining Co. *v.* The Att'y Gen'l, 15 Com. L. R. 182 (1912); Cock *v.* The Att'y Gen'l, 28 N. Z. L. R. 405 (1909). "In effect the New Zealand court held . . . that the *examination* as well as the *determination* of matters of rights before extraordinary tribunals was within the mischief provided against by 42 EDW. III, c. 3 (1368), and the Act for the Abolition of the Star Chamber, 16 CAR. I, c. 10 (1640)." See W. Jethro Brown, "The Separation of Powers," 31 YALE L. J. 24, 27.

[6] TEXAS REV. CIV. STAT., *supra*, art. 5011½ f, states that "in case suit is started in any court for the determination of [these] rights . . . , the case may, in the discretion of the court, be transferred to the [board] for determination. . . ." This might lead one to reason that, since the power formerly exercised by the court was judicial, that now exercised by the board must also be judicial. It must be admitted that the character of an administrative organ may not be so impressed upon every power which it may conceivably exercise as to affect the power with a nature like its own. But whereas the sole purpose of the adjudication before the court was undoubtedly judicial, the determination before the board differs at least to the extent that it is merely incidental to a further and concededly administrative end. Looked upon in their entirety, there is a distinct difference between the two proceedings.

[7] Pacific Live Stock Co. *v.* Lewis, 241 U. S. 440 (1915). See also Bergman *v.* Kearney, 241 Fed. 884 (D. Nev., 1917).

[8] *In re* Willow Creek, 74 Oreg. 592, 144 Pac. 505 (1914), 146 Pac. 475 (1915). The court encountered no difficulty in the fact that the board was charged with a duty ordinarily performed by a judicial officer, apparently because it was making only such findings as it was obliged to make to carry out the purpose for which it was created.

[9] It would be interesting to know the result if the court should refuse to approve the findings. The question would thus be whether the court was not charged with the performance of administrative functions. See Hayburn's Case, 2 Dall. (U. S.) 409 (1792); United States *v.* Ferreira, 13 How. (U. S.) 40, 49–51 (1851); Yale *v.* Todd, 13 How. (U. S.) 52, note (1794). See also note 17, *infra*.

[10] Board of Water Engineers *v.* McKnight, 229 S. W. 301 (Tex., 1921). For the facts of this case see RECENT CASES, *infra*, p. 470.

[11] The Constitution of Texas provides (Art. 2, § 1): "The powers of the government of the state of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of the magistracy, . . . and no person or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted." It seems immaterial in the principal case that the separation of powers was here express rather than implied, as in constitutions of the federal type, since the action of the board was, on the grounds stated *infra*, clearly not judicial.

that the board does make a determination with regard to private rights, but this is a determination in the sense not of an adjudication, but rather of an ascertainment, which is to form the basis of subsequent regulative measures. After it has been reached, pre-existing rights remain as they were before, in no wise extinguished. It is true that they are now in a position in which they may be lost or curtailed if an action, in the form of a trial *de novo*, is not brought within the prescribed period. But in any case, the findings themselves do not destroy them. They operate as an assertion by the state as to what the rights are. This assertion may be disputed only within a short period of limitations which the state has created, actuated by a public policy which demands that the administrative end be speedily and efficiently achieved. It is by the operation of this limitation of remedy that the rights are cut off.[12] Meantime they are fully protected by the provision for appropriate proceedings *de novo* in regular courts.[13]

A more difficult question is raised by a statute which makes the administrative action final. The difficulty here is with the doctrine of the separation of powers. When the Federal Constitution was framed, it was well recognized that the powers of the three great departments shade almost imperceptibly into one another and apparently overlap.[14] The constitution does provide for three separate departments of government, each of which it vests with one of the three kinds of powers, but it does not expressly provide anywhere that the three shall be kept entirely distinct.[15] On the other hand, it contains certain express provi-

[12] The statute might be attacked on the ground that the length of this period did not afford due process. In the Texas statute, persons who appeared before the board were given six months in which to bring an action, and those who did not, three years. This seems sufficient. See Bragg *v.* Weaver, 251 U. S. 57 (1919).

[13] 10 STAT. AT L. 99 contains provisions very similar to those of the Texas statute. Under it, the board itself is required to file an appeal with the district court, but if a notice of intention to prosecute the appeal is not filed by an aggrieved party within six months, the appeal will be regarded as dismissed. It may thus happen that the administrative findings are not put into the form of a judicial decree or judgment, and the act, therefore, gives them substantially the same finality as they receive by virtue of the Texas statute.

The act was upheld by the Supreme Court in United States *v.* Ritchie, 17 How. (U. S.) 525 (1854). See also Degge v. Hitchcock, 229 U. S. 162 (1912)..

For a collection of cases under similar statutes, see 2 WIEL, WATER RIGHTS, 3 ed., §§ 1192–1194; LONG, IRRIGATION, c. 12.

[14] See THE FEDERALIST, No. 47; FARRAN, THE FRAMING OF THE CONSTITUTION, 49 *et seq.* This fact has become increasingly apparent with the expansion of the scope of governmental, especially administrative, activities. See Green, "The Separation of Powers," 29 YALE L. J. 369.

[15] In 1908, only six state constitutions approximated the federal type. That of Rhode Island, however, merely provided that the powers of government should be distributed among three departments. The provision of the New Hampshire Constitution is interesting. It reads: "The three essential powers . . . ought to be kept as separate from, and as independent of, each other as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity." (Pt. I, Art. 37.) The thirty-seven others expressly provide that the three departments shall be distinct, almost always with the added restriction that no person or persons belonging to one of the departments may exercise any power properly belonging to one of the other departments. See THORPE, FEDERAL AND STATE CONSTITUTIONS, etc. The constitutions of the three new states, Oklahoma (1907), Arizona (1910), and New Mexico (1911) are all of the last type. This type seems to go beyond the doctrine of the sepa-

sions to the contrary. Some of these may be explained on the ground that they form part of the system of checks and balances,[16] but this does not explain others, *e. g.*, legislative determination of disputed elections of members, trial of members, etc. Futhermore, apart from express provisions, there have always been some matters as to which there has apparently been an exception. An example directly in point is the final administrative determination of assessments, duties, and other matters incident to the collection of revenues. The question, therefore, arises as to just what the doctrine really means in practice. Throughout its history, powers have been defined in terms of the ends to be accomplished by their exercise.[17] Accordingly, in its essence, the doctrine is a doctrine of the separation of ends. This perhaps does little more than restate the problem, yet it does to a certain extent clarify it; for once it is clear that an end is administrative, it follows, under a constitution of the federal type at least, that whatever action is incidental to the accomplishment of that end may properly be taken by an administrative body even though it be of a type ordinarily regarded as exclusively associated with one of the other departments, provided it is necessary to the effective [18] accomplishment of the end [19] that it be engaged in by the first.[20] But to go beyond this would be to allow an encroachment upon a field expressly granted to another department.[21] Thus the critical problem becomes one of the nature of the ends. To solve it, resort must be had to analogies existing at the time of the adoption of the Constitution.[22] A mere list of the ends delegated to each of the different depart-

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ration of powers both as it was originally stated and as it was incorporated into the Federal Constitution. With reference to this type, it would probably be difficult to support all the contentions here made in respect to constitutions of the federal type. Nevertheless, despite the language, there are apparently some exceptions to the doctrine even under them. See City of Indianapolis *v.* State, 132 N. E. 165 (Ind., 1921).

[16] For example, the veto power of the President, the power of Congress over impeachment, etc.

[17] The doctrine had its origin in the political philosophies of Aristotle, Locke, and Montesquieu. See ARISTOTLE, POLITICS (Jowett's Translation), Book VI, c. XIV; LOCKE, TWO TREATISES ON GOVERNMENT, Book II, c. VIII and XII–XIV; MONTESQUIEU, L'ESPRIT DES LOIS, Livre XI, c. VI; 1 THAYER, CASES ON CONSTITUTIONAL LAW, 1–3; 30–34. *Cf.* W. J. Brown, *supra*, 31 YALE L. J. 24.

In the article last cited it is suggested that the nature of a power is determined by both end and process. The doctrine of the separation of powers itself, however, certainly contains no exact conception of process. If there is a requirement as to process, it is superadded to the essential part of the doctrine and is applicable only after the end has been determined proper to one department or another.

[18] The use of such a word as "effective" while unavoidable in stating a general proposition, gives rise nevertheless to a multitude of questions. It is the idea at the root of the controversy over the Ju Toy case. United States *v.* Ju Toy, 198 U. S. 253 (1904).

[19] "The effect of the inquiry, and the decision upon it, is determined by the nature of the act to which the inquiry and the decision lead up," per Holmes. J., in Prentis *v.* Atlantic Coast Line, 211 U. S. 210, 227 (1908). See also Hughes, J., in Louisville etc. R. R. Co. *v.* Garrett, 231 U. S. 298. 307 (1913). *Cf.* Local Government Board *v.* Arlidge, [1913] 1 K. B. 463, [1914] 1 K. B. 160, [1915] A. C. 120. See L. Curtis, "Judicial Review of Commission Rate Regulation," 34 HARV. L. REV. 862.

[20] Mutual Film Corporation *v.* Ohio, 236 U. S. 230 (1914); Intermountain Rate Cases, 234 U. S. 476 (1913); Field *v.* Clark, 143 U. S. 649 (1891).

[21] See Pound, "Spurious Interpretation," 7 COL. L. REV. 379.

[22] Two things are to be considered, both analogy to what was considered proper when the constitution was adopted, and also analogy to what was considered improper.

ments is not, however, sufficient. The principles which determined their distribution must be sought. The principle most applicable in determining whether an end is administrative is that it is so where the public interest in the summary disposition of rather technical or extremely complex matters overrides the individual and social interests in the judicial protection of private rights.[23] As administrative machinery becomes more efficient, the force of the objection to its determination of such rights is weakened. But at no time is a final solution of the problem possible. Changes in judicial and political philosophy, influencing the weight given to these various interests, must constantly modify the conception of what are, properly, administrative ends.[24]

A DISTINCTION IN THE *RENVOI* DOCTRINE. — Broadly stated, the doctrine of the *renvoi* is that, when by its rules of the conflict of laws a court must apply the law of some other legal unit, it must apply not only the internal law of that unit, but also its rules of the conflict of laws. This might result in the application of the internal law either of the forum or of a third country. Take the Englishman domiciled in France who dies intestate leaving movables in England and Italy. By English law distribution is according to the law of the domicile, but if the *renvoi* doctrine is accepted, that law would include the French conflict-of-laws rule that English law, as the national law, should govern. And if Italy accepted the *renvoi* doctrine it would be directed from English law to French law.[1] What is the proper rule? Juristic speculation has been almost infinite.[2]

The discussion has hitherto been largely confined to cases like that

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Compare, for example, the case of Plymouth Coal Co., *v.* Pennsylvania, 232 U. S. 531 (1913), with the cases of Wong Wing *v.* United States, 163 U. S. 228 (1895), and *Ex parte* Milligan, 4 Wall. (U. S.) 2 (1866).

[23] See Field, J., in Hagar *v.* Reclamation District No. 108, 111 U. S. 701 (1883). *Cf.* Cary *v.* Curtis, 3 How. (U. S.) 236 (1845); Central of Georgia Ry. Co. *v.* Wright, 207 U. S. 127 (1907).

The recent case of City of Indianapolis *v.* State, in note 15, *supra*, also furnishes an excellent example of this kind. There the statute provided that, in a contest over paying assessments, upon petition of the property owners the court should appoint a board of appraisers. The decision of this board was to be final, and its determination was to be "entered as a judgment upon the records of the court." The statute was upheld. The court recognized that taxation has been generally held to be a purely administrative end, and the determination of the value of property merely an incident thereto.

[24] See Pound, "Executive Justice," 55 AM. L. REG. 137; Pound, "The Revival of Personal Government," PROC. N. H. BAR ASSN. (1917) 13; Goodnow, "The Growth of Executive Discretion," 2 PROC. AM. POL. SCI. ASSN., 29; Powell, "Judicial Review of Administrative Action in Immigration Proceedings," 22 HARV. L. REV. 360.

[1] Since this is really a sending *on*, it is called in German, *Weiterverweisung*, as distinguished from the former case of sending *back*, called *Rückverweisung*.

[2] For a list of all the writings, see Ernest G. Lorenzen, "The *Renvoi* Doctrine in the Conflict of Laws," 27 YALE L. J. 509, 531 *et seq.* To those in English may now be added, Ernest O. Schreiber, Jr., "The Doctrine of the *Renvoi* in Anglo-American Law," 31 HARV. L. REV. 523.